

NOV 27 1940

CHARLES E. LINDSEY, JR.

IN THE
Supreme Court of the United States

October Term, 1940

No. 597.

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

HARRY T. KLEIN,

A. E. VAN DUSEN,

JAMES T. NIELSEN,

Attorneys for Petitioner,

135 East 42nd Street,

New York, N. Y.



SUBJECT INDEX

	PAGE
Petition	1-6
Summary and Statement of Matter Involved.....	1
Opinions Below	4
Jurisdictional Statement	4
Questions Presented	4
Reasons Relied on for Allowing the Writ.....	5
Brief in Support of Petition.....	7-13
Argument	7
Conclusion	10
Appendix	11

Table of Cases.

In re Labor Board, 304 U. S. 486.....	5, 8, 9
---------------------------------------	---------

Statutes.

National Labor Relations Act, 49 Stat. 449.....	11
Section 2(6) and (7).....	2
Section 8(1)	2
Section 10(e) and (f).....	6, 7, 8, 9



IN THE
Supreme Court of the United States

October Term, 1940

No.

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

The petitioner, The Texas Company, prays a writ of certiorari to review the order of the Circuit Court of Appeals for the Seventh Circuit, entered in this cause on September 28, 1940, dismissing the petition of The Texas Company to review and set aside a decision and order of the National Labor Relations Board, dated July 3, 1940.

Summary and Statement of Matter Involved.

This case arises out of certain charges filed by the National Maritime Union of America (hereinafter referred to as "Union"), pursuant to which the National Labor Relations Board (hereinafter referred to as "Board"), under

date of January 3, 1939, issued a complaint alleging that the petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1) and Section 2(6) and (7) of the National Labor Relations Act (hereinafter sometimes referred to as "Act"), in that petitioner refused to grant passes to the union's representatives for the purpose of obtaining access to employes of petitioner on board petitioner's tank vessels (Transcript of Record, p. 2). Similar complaints were issued by the Board against Cities Service Oil Company and The Pure Oil Company, and the three proceedings were consolidated. Petitioner filed an answer which admitted that petitioner's policy had been to deny passes to everyone desiring to board its vessels other than duly authorized employes and representatives of the petitioner, and alleged that in carrying out said policy petitioner had not in any way or at any time discriminated between any labor organizations (Transcript of Record, p. 2). The answer alleged that in the light of these facts petitioner's refusal to grant passes was not an unfair labor practice, and further alleged that in the event the National Labor Relations Act was construed to require petitioner to issue passes, then such Act, as so construed, violated the Fifth Amendment to the Constitution of the United States (Transcript of Record, p. 2). On the issues thus raised lengthy hearings were held, and an oral argument was had before the Board. Thereafter, on July 3, 1940, the Board issued a decision and order finding that the petitioner, by its refusal to grant passes to the union's representatives to board petitioner's vessels, had interfered with, restrained, and coerced petitioner's employes in the exercise of the rights guaranteed them in Section 7 of the Act and had thereby violated Section 8(1) of the Act (Transcript of Record, p. 4).

On August 26, 1940, petitioner filed in the United States Circuit Court of Appeals for the Seventh Circuit a petition

for review of and to set aside the said decision and order of the Board, dated July 3, 1940, and on the same day served on the Board by registered mail a copy of said petition (Transcript of Record, pp. 1-6). On August 28, 1940, petitioner's attorney requested the Board in writing to file a certified transcript of the proceedings before the Board or to furnish the petitioner with a certified copy of such transcript (Transcript of Record, p. 19). Promptly thereafter Cities Service Oil Company and The Pure Oil Company filed in the United States Circuit Court of Appeals for the Seventh Circuit motions for leave to intervene in the proceeding commenced by the petition for review filed in that circuit by your petitioner (Transcript of Record, p. 18).

Subsequently, on August 31, 1940, the National Labor Relations Board filed in the United States Circuit Court of Appeals for the Second Circuit a petition for enforcement of the order of the Board above referred to, together with a certified transcript of the record of the proceedings before the Board (Transcript of Record, p. 8). The Board then proceeded to file a motion in the Seventh Circuit Court of Appeals to dismiss the petition for review filed by your petitioner upon the ground that no certified transcript of the record had been filed in the Seventh Circuit and that, since a certified transcript had been filed in the Second Circuit, the latter Circuit had exclusive jurisdiction of the case (Transcript of Record, pp. 6-12).

Your petitioner opposed the Board's motion to dismiss upon the ground that its petition for review had been filed in the Seventh Circuit before the Board filed its petition for enforcement in the Second Circuit and on the ground that your petitioner had made demand upon the Board for a certified transcript of the record prior to the time when the Board filed its petition for enforcement and such transcript in the Second Circuit (Transcript of Record, pp.

12-19). Your petitioner also moved in the Seventh Circuit for an order directing the Board to certify and file the record in that Circuit (Transcript of Record, pp. 20-27).

The Pure Oil Company and Cities Service Oil Company filed memoranda opposing the Board's motion to dismiss the petition for review filed in the Seventh Circuit. On September 28, 1940, however, the United States Circuit Court of Appeals for the Seventh Circuit entered the order which it is here sought to review, granting the motion of the Board to dismiss your petitioner's petition for review (Transcript of Record, pp. 33-34).

Opinions Below.

The decision and order of the National Labor Relations Board is reported as 25 N. L. R. B. No. 12 (official reports not bound). The decision of the Circuit Court of Appeals on the motion to dismiss is not reported and no opinion was rendered by such Court in connection with said decision.

Jurisdictional Statement.

The order of the Circuit Court of Appeals (Transcript of Record, pp. 33-34) was entered on September 28, 1940. The jurisdiction of this Court is based on Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938.

Questions Presented.

The questions presented by the order of the Circuit Court of Appeals, Seventh Circuit, dismissing the petition for review filed by your petitioner, are as follows:

1. Where, pursuant to Section 10(f) of the National Labor Relations Act, a person aggrieved by a final order of the National Labor Relations Board

has filed in the United States Circuit Court of Appeals, in a circuit in which such person resides or transacts business, a written petition for review praying that the order of the Board be modified or set aside, and has demanded of the Board a certified transcript of the entire record in the proceeding, may the Board deprive such Circuit Court of Appeals of jurisdiction by failing or declining to file or furnish a certified copy of the transcript and by subsequently filing a petition for enforcement, together with a certified transcript, in another circuit?

2. Where, pursuant to Section 10(f) of the National Labor Relations Act, a person aggrieved by a final order of the National Labor Relations Board has filed in the United States Circuit Court of Appeals, in a circuit in which such person resides or transacts business, a written petition for review praying that the order of the Board be modified or set aside, and has demanded of the Board a certified transcript of the entire record in the proceeding, what relief, if any, is available to the person who has filed such petition for review, where the Board does not desire to modify or set aside its order but fails or refuses to furnish a transcript of its proceedings?

Reasons Relied on for Allowing the Writ.

It is submitted that the decision of the Circuit Court of Appeals for the Seventh Circuit raises an important question of Federal law which has not been, but should be, settled by this Court. That the question here involved is such a question is indicated by the decision of this Court in *In re Labor Board*, 304 U. S. 486, decided May 31, 1938. In that case it was held that where a petition for review had been filed in the Circuit Court of Appeals, the Board could never-

theless vacate its order and reopen the case at any time before the transcript of the record was filed. In so deciding, this Court referred to the contention of one of the parties that unless jurisdiction was held to vest in the Circuit Court of Appeals upon the filing of the petition for review, the Board could hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay and perhaps deny any effective judicial review. In commenting on this contention, the Court said:

“No such case is here presented. We have no occasion to determine what, if any, relief may be needed by or available to a party who has filed his petition for review, where the Board does not desire to modify or set aside its order but fails or refuses to furnish a transcript of its proceedings.”

The question referred to in the quoted language is now squarely before this Court for determination. Petitioner respectfully submits that it is a question of great importance which should be decided. Under the construction adopted by the Board and the Circuit Court of Appeals for the Seventh Circuit, the effectiveness of Section 10(f) of the National Labor Relations Act is for all practical purposes nullified, as the Board may in any case in which a petition for review is filed, decline to furnish a certified transcript of the record, thereby depriving the petitioner of its rights under Section 10(f) of the National Labor Relations Act.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari be granted.

HARRY T. KLEIN,
ALBERT E. VAN DUSEN,
JAMES T. NIELSEN,
Attorneys for Petitioner.





BRIEF IN SUPPORT OF PETITION.

Argument.

Section 10(f) of the National Labor Relations Act provides as follows:

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.”

Pursuant to such section petitioner on August 26, 1940 filed with the United States Circuit Court of Appeals for the Seventh Circuit a written petition for review praying that this Court set aside an order of the National Labor

Relations Board dated July 3, 1940 (Transcript of Record, pp. 1-6). There is no question but that petitioner was a "person aggrieved" by such order, nor is there any question but that petitioner transacted business in the Seventh Circuit, and petitioner contends, therefore, that upon the filing of its petition in the Seventh Circuit that court was vested with jurisdiction of this proceeding and could only be divested of such jurisdiction in the event the Board desired to reopen the proceedings or to vacate or modify its order. *In re Labor Board*, 304 U. S. 486.

It is, of course, true that after the filing of the petition for review the petitioner is required to file in the Circuit Court of Appeals a transcript of the entire record. However, Section 10(f) expressly provides that such transcript shall be "certified by the Board". It is readily apparent that a petitioner under Section 10(f) can do no more than to request the Board to furnish or file with the Court the required certified copy of the transcript. This your petitioner did immediately after filing its petition for review, notwithstanding which the Board, five days after the petition for review had been filed and two days after the Board had received petitioner's demand for a certified transcript of the record, proceeded to file a petition for enforcement in the Second Circuit and filed the transcript in that circuit (Transcript of Record, pp. 8, 25, 26). In so doing the Board showed no intention to retain the case but rather endeavored deliberately to deprive the Seventh Circuit of the jurisdiction vested in it by Section 10(f) of the Act and to vest jurisdiction of this proceeding in the Second Circuit.

There can be no doubt, upon reading Sections 10(e) and 10(f) of the Act, that Congress intended that an order of the Board could be reviewed by a circuit court of appeals in either of two ways: (1) by the filing of a petition for enforcement by the Board (Section 10(e)) or (2) by the

filing of a petition for review by an aggrieved person (Section 10(f)). This is plainly indicated by the fact that these alternative remedies are set forth in two separate and distinct paragraphs of the Act.

If the Board is correct in its position, then Section 10(f) is of no force and effect, since the Board, having the sole power to certify the transcript of the record, can alone determine which circuit court shall have jurisdiction of the controversy, and an "aggrieved person" may thereby be deprived of the right to seek a review of an order of the Board contrary to the express purpose and intent of the statute itself.

If the Act is to be construed as it is construed by the Board and by the Circuit Court of Appeals for the Seventh Circuit (by reason of the decision of that court dismissing the petition for review herein), then the Board may in any case refuse to certify the transcript and thereby prevent an "aggrieved person" from ever obtaining a review. Such a construction of the Act would completely nullify the effectiveness of Section 10(f) and would fly directly in the teeth of the intent of Congress, an intent for which this Court has always had the most scrupulous regard.

The inequity of such a situation was recognized by this Court in *In re Labor Board*, 304 U. S. 486, as clearly appears from the opinion in that case in which it was said:

"The contention that the Act cannot be applied in accordance with its apparent intent is that, as only the Board can certify the proceedings, and the petitioner under subsection (f) must file the certified transcript, such a construction would enable the Board to hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay, and perhaps deny, any effective, judicial review. *No such case is here presented. We have no occasion to determine what, if any, relief may be needed by or*

available to a party who has filed his petition for review, where the Board does not desire to modify or set aside its order but fails or refuses to furnish a transcript of its proceedings." (Italics ours.)

The question referred to is squarely raised in the instant case.

Conclusion.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

HARRY T. KLEIN,
ALBERT E. VAN DUSEN,
JAMES T. NIELSEN,
Attorneys for Petitioner.





APPENDIX.

National Labor Relations Act, 49 Stat. 449.

Section 10.

“(c) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were

reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall

have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."



FILED

JAN 2 1941

CHARLES ELMORE CROYLE
CLERK

IN THE
Supreme Court of the United States
October Term, 1940
No. 597

THE TEXAS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR PETITIONER.

HARRY T. KLEIN,
ALBERT E. VAN DUSEN,
JAMES T. NIELSEN,
Attorneys for Petitioner,
135 East 42nd Street,
New York, N. Y.



IN THE
Supreme Court of the United States
October Term, 1940
No. 597

THE TEXAS COMPANY,
Petitioner,
vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR PETITIONER.

The entire brief of the National Labor Relations Board in opposition to our petition for a writ of certiorari herein is predicated upon the assumption that the Circuit Court of Appeals for the Seventh Circuit could not be vested with jurisdiction to enforce the Board's order against Cities Services Oil Company, one of the three respondents in the consolidated proceeding, since Cities Service Oil Company neither resides nor transacts business in the Seventh Circuit. On this assumption the Board argues that proper and efficient administration of the Act requires that only one Circuit Court of Appeals consider the Board's order and that, accordingly, on the authority of *Stanolind Oil and Gas Company v. National Labor Relations Board*, decided December 14, 1940 (C. C. A., 5th), the petition for review was properly dismissed.

We respectfully submit that this assumption was erroneous since the Circuit Court of Appeals had full jurisdiction over Cities Service Oil Company as well as over The

Pure Oil Company and The Texas Company, and, accordingly, the Seventh Circuit should have denied the Board's motion to dismiss our petition for review and should have directed the Board to file a certified transcript of the proceedings.

As appears from the record (p. 7) Cities Service Oil Company filed in the Seventh Circuit on August 29, 1940 a motion for leave to intervene in the proceeding commenced by The Texas Company's petition for review. The said motion for intervention by Cities Service Oil Company was filed in the Seventh Circuit two days before the Board filed its petition for enforcement in the Second Circuit (R. 14).

Clearly, any Circuit Court of Appeals has jurisdiction of the subject matter, namely, of petitions for review or for enforcement of orders of the National Labor Relations Board. Equally clearly, any Circuit Court of Appeals could obtain jurisdiction over Cities Service Oil Company by the consent of that company, even though it did not reside or do business within the Circuit.

By filing a motion to intervene, Cities Service Oil Company manifested its consent to be made a party to the review proceedings pending in the Seventh Circuit and unquestionably submitted itself to the jurisdiction of that court.

Commercial Electric Supply Co. v. Curtis (C. C. A., 8th, 1923), 288 Fed. 657, 659;

Victor Talking Machine Co. v. Brunswick-Balke-Collender Co. et al. (District Court, Delaware, 1922), 279 Fed. 758, 762;

Interstate Railway Co. et al. v. Philadelphia, B. & T. Street Railway Co. et al. (Circuit Court, Pennsylvania, 1908), 164 Fed. 770, 772;

President, etc., of Bowdoin College et al. v. Merritt (Circuit Court, California, 1893), 59 Fed. 6.

In the light of these authorities, there can be no question but that a motion for intervention constitutes a general appearance on the merits. By entering such an appearance, the intervenor waives all special privileges in respect to the particular court in which the action is brought and submits to the jurisdiction of the Court. *St. Louis and San Francisco Railway Co. v. McBride* (1891), 141 U. S. 127, 130.

These general principles are too clear and too well known to admit of doubt. It would appear that the National Labor Relations Board declined to file a certified transcript of the record in the Seventh Circuit, not because of any doubt as to the jurisdiction of that court over the Cities Service Oil Company as intervenor, but in a deliberate endeavor to deprive the Seventh Circuit of the jurisdiction vested in it by Section 10(f) of the National Labor Relations Act and to vest jurisdiction in the Second Circuit, presumably because of the Board's desire to appear as petitioner in an enforcement proceeding rather than respondent in a review proceeding.

Conclusion.

We respectfully submit that for the reasons set out in our petition for a writ of certiorari herein, the said petition should be granted.

HARRY T. KLEIN,
ALBERT E. VAN DUSEN,
JAMES T. NIELSEN,
Attorneys for Petitioner.



FILED
DEC 21 1940

CHARLES BLAINE HOSLEY
CLERK

No. 697

In the Supreme Court of the United States

October Term, 1940

THE TEXAS COMPANY, PETITIONER

NATIONAL LUMBER EXCHANGE, RESPONDENT

ON PETITION FOR A WRIT OF HABEAS CORPUS TO REMOVE FROM
DETENTION WITHOUT BOND OR SURETY THE RESPONDENT
DETENT

WRIT FOR THE NATIONAL LUMBER EXCHANGE, RESPONDENT

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	5
Conclusion.....	10
Appendix.....	11

CITATIONS

Cases:

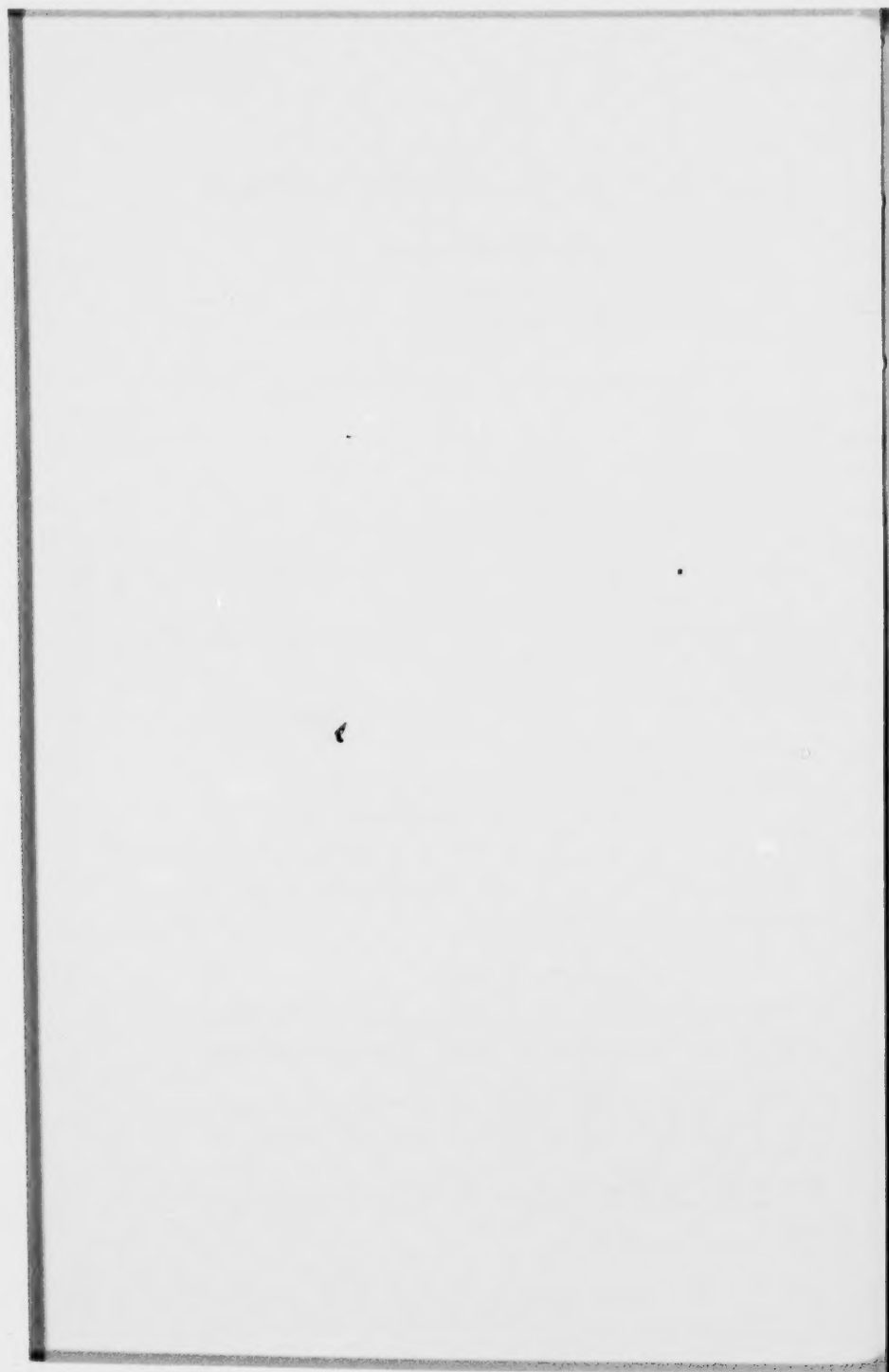
<i>Ford Motor Co. v. National Labor Relations Board</i> , 305 U. S. 364.....	6
<i>Hicks v. National Labor Relations Board</i> , 100 F. (2d) 804..	6
<i>National Labor Relations Board, Matter of</i> , 304 U. S. 486..	5, 6
<i>National Labor Relations Board v. Friedman, Harry Marks Clothing Co.</i> , 83 F. (2d) 731.....	6
<i>Standard Oil Co. (Indiana), Matter of, Matter of Stanolind Gas and Oil Co.</i> , 25 N. L. R. B., No. 122.....	8
<i>Standard Oil Co. v. National Labor Relations Board</i> , 114 F. (2d) 743.....	9
<i>Stanolind Oil and Gas Co. v. National Labor Relations Board</i> , decided December 14, 1940.....	7, 9

Statute:

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 141, <i>et seq.</i>):	
Section 10 (e) and (f)	2

Miscellaneous:

National Labor Relations Board, Rules and Regulations, Series 1, as amended, Art. II, Sec. 37 (b).....	3
--	---



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 597

THE TEXAS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported in 25 N. L. R. B., No. 12.¹ The order of the court below (R. 33-34) was entered without opinion and is not reported.

JURISDICTION

The order of the court below (R. 33-34) was entered on September 28, 1940. The petition for

¹ This is a copy of the decision and order printed in pamphlet form and issued in advance of the bound volume. It is available in the library of this Court. The Board's order is set forth in Appendix A, pp. 11-12, *infra*.

a writ of certiorari was filed on November 27, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 4).

QUESTION PRESENTED

The National Labor Relations Board issued a single order against three employers upon a single record made in a consolidated case. One of the employers petitioned for review of the order in the Circuit Court of Appeals for the Seventh Circuit, which could not, under the Act, be vested with jurisdiction to enforce the order against another of the three employers. The Board, believing that proper administration of the Act required consideration of the validity of the order by a circuit court of appeals which could be vested with jurisdiction to enforce the order against all three employers, filed a petition for enforcement against all three employers, together with a certified transcript of record, in the Circuit Court of Appeals for the Second Circuit. No transcript of record was ever filed in the Circuit Court of Appeals for the Seventh Circuit. The question is whether the latter court erred in dismissing, upon motion by the Board, the petition for review filed in that court.

STATUTE INVOLVED

Sections 10 (e) and (f) of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449,

29 U. S. C., Supp. V, Sec. 141, *et seq.*) are set forth in the petition (pp. 11-13).

STATEMENT

The National Maritime Union of America, C. I. O., filed with the Board separate charges against petitioner and two other employers, Cities Service Oil Company and The Pure Oil Company (R. 6-7). The Board ordered the three proceedings consolidated for purposes of hearing (R. 6-7). See National Labor Relations Board, *Rules and Regulations, Series 1, as amended*, Art. II, Sec. 37 (b). Petitioner did not object to the order of consolidation (see R. 2-4, 5-6). Thereafter the Board issued complaints against petitioner and the other two employers (R. 2, 6-7). After further customary proceedings (R. 2-4), the Board on July 3, 1940, issued a single decision in the consolidated proceeding and a single order, running against all three companies (R. 7; pp. 11-12, *infra*). The decision and order were based upon a single record, namely that made at the hearing on all three complaints held pursuant to the Board's order of consolidation (R. 2, 7). The only unfair labor practices alleged in the complaints and found by the Board consisted of the employers' refusals to issue passes to board their ships to representatives of the National Maritime Union, which was the certified collective bargaining representative of the unlicensed personnel on those ships. The Board's order required the three employers to

cease and desist from the unfair labor practices found and, as affirmative action, to grant passes under such conditions and in such number as should be determined by collective bargaining, and to post appropriate notices (*infra*, pp. 11-12).

On August 26, 1940, petitioner filed in the Circuit Court of Appeals for the Seventh Circuit a petition to review and set aside the Board's order (R. 1-6). On August 28, 1940, Cities Service Oil Company presented to that court a motion for leave to intervene in the proceeding initiated by petitioner (R. 7, 18). This motion specifically alleged that Cities Service Oil Company was not engaged in business in any of the States comprising the Seventh Judicial Circuit (pp. 12-13, *infra*);² since the unfair labor practices had all occurred outside that Circuit the Board could not file in the Circuit Court of Appeals for the Seventh Circuit a petition for enforcement of its order against that company. See Section 10 (e); R. 7-8, 10, 28-30. The Board, believing that proper administration of the Act required that its order, issued upon a single record, be reviewed in its entirety by a Circuit Court of Appeals having jurisdiction to enforce it against

² Subsequently the Pure Oil Company likewise filed a motion for leave to intervene (R. 18). The motions for leave to intervene were omitted from the printed record herein, as were the memoranda filed by Cities Service Oil Company and The Pure Oil Company in opposition to the Board's motion to dismiss the petition for review. We have filed with the Clerk a certified copy of Cities Service's motion. Paragraph XVI of that motion is set forth in Appendix B, pp. 12-13, *infra*.

all three employers, filed a petition for enforcement of the order against the three companies, together with a transcript of the entire record in the proceeding certified by the Board, in the Circuit Court of Appeals for the Second Circuit (R. 10-12, 29-30). Some of the unfair labor practices of each employer occurred within that judicial circuit (R. 11).

On September 6, 1940, the Board filed in the court below a motion to dismiss petitioner's petition for review on the ground that the Circuit Court of Appeals for the Second Circuit was vested with exclusive jurisdiction over the entire proceeding and that the Circuit Court of Appeals for the Seventh Circuit was without jurisdiction further to entertain the petition (R. 6-12). On September 28, 1940, the court entered an order granting the Board's motion and dismissing the petition for review (R. 33-34).

ARGUMENT

The mere filing of the petition for review did not vest the Circuit Court of Appeals for the Seventh Circuit with jurisdiction to review the Board's order; such jurisdiction attaches only upon the filing of the entire transcript of record, certified by the Board. *In the Matter of the National Labor Relations Board*, 304 U. S. 486, 492-493. A transcript of record was never filed in the Seventh Circuit; instead the Board filed a transcript and a petition for enforcement in the Circuit Court of Appeals for the Second Circuit, in which some

of the unfair labor practices of each employer occurred. Thereupon that court acquired "jurisdiction of the proceeding and of the question determined therein," and that jurisdiction was "exclusive." Section 10 (e); see *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731, 732-733 (C. C. A. 2d); *Hicks v. National Labor Relations Board*, 100 F. (2d) 804, 805-806 (C. C. A. 4th). The court below, therefore, correctly dismissed the petition for review.

The present case plainly does not involve, as petitioner contends (Pet. 5-6, 9-10), the hypothetical situation to which this Court referred in *Matter of National Labor Relations Board*, 304 U. S. at 494, that is, a deliberate withholding of the transcript of record by the Board in order to "delay, and perhaps deny, any effective judicial review." The proceeding initiated by the Board in the Circuit Court of Appeals for the Second Circuit afforded petitioner, as well as the other two employers against whom the order ran, as full opportunity for relief against the order as could have been obtained by petitioner in the court below. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 369 (see R. 30-32). Thus, petitioner's assertion (Pet. 9) that under the interpretation of the Act implied by the decision below "the Board may in any case refuse to cer-

tify the transcript and thereby prevent an 'aggrieved person' from ever obtaining a review'' is entirely unwarranted. There is no indication that the court below would have dismissed the petition for review if the Board had not previously instituted enforcement proceedings in the Circuit Court of Appeals for the Second Circuit. The motion to dismiss was grounded upon the pendency of those proceedings (R. 6-12, 27-33).

Proper and efficient administration of the Act required that only one circuit court of appeals consider the Board's order and the single record upon which it was made, and that that court be one which could be vested with jurisdiction to decree enforcement of the order against all three employers. Plainly, it was not improper for the Board to seek to avoid a situation in which two, or possibly three, circuit courts of appeals would pass upon the validity of the same order, with perhaps conflicting results.³

The action of the court below in dismissing the petition for review is in accord with the only other decision under the National Labor Relations Act dealing with a comparable situation. *Stanolind Oil and Gas Co. v. National Labor Relations Board*, decided December 14, 1940 (C. C. A. 5th). There the Board issued a single decision and order against Stanolind and its parent corporation, the

³ ~~Pure~~ Oil Company asserted the desirability of complete review by one court in its motion to intervene (*infra*, pp. 12-13).

Standard Oil Company, upon one record made in a consolidated proceeding. *Matter of Standard Oil Co. (Indiana)*, *Matter of Stanolind Oil and Gas Co.*, 25 N. L. R. B., No. 122. Stanolind filed a petition for review of the order in the Circuit Court of Appeals for the Fifth Circuit and Standard filed a similar petition in the Circuit Court of Appeals for the Eighth Circuit. Neither company was engaged in business within the judicial circuit chosen by the other, and all of the unfair labor practices found occurred within the Tenth Judicial Circuit. Since it was impossible to vest jurisdiction over both companies in either the Circuit Court of Appeals for the Fifth Circuit or the Circuit Court of Appeals for the Eighth Circuit, and no transcript of record having been filed in either of those courts, the Board filed a petition for enforcement and a certified transcript of record in the Circuit Court of Appeals for the Tenth Circuit. The Board then moved the Circuit Courts of Appeals for the Fifth and Eighth Circuits to dismiss the petitions for review; in opposition, the companies advanced, in substance, the contentions made by petitioner here. The Circuit Court of Appeals for the Eighth Circuit granted the Board's motion, holding that the order "is subject to review in not more than one Circuit Court of Appeals" and that it was unnecessary to decide whether the Circuit Court of Appeals for the Fifth Circuit acquired exclusive jurisdiction to review the order

pursuant to Stanolind's petition, filed prior to Standard's petition in the Circuit Court of Appeals for the Eighth Circuit, or whether the Circuit Court of Appeals for the Tenth Circuit had such jurisdiction. *Standard Oil Co. v. National Labor Relations Board*, 114 F. (2d) 743, 744 (C. C. A. 8th). Thereafter the Circuit Court of Appeals for the Fifth Circuit also granted the motion to dismiss. *Stanolind Oil and Gas Co. v. National Labor Relations Board*, decided December 14, 1940. The court said:

It is apparent we would not have jurisdiction over the Standard Oil Co. of Indiana and that the Court of Appeals for the Tenth Circuit would have jurisdiction over all parties. The petition to review was filed in this court before the Labor Board filed its proceeding in the Tenth Circuit, but that is immaterial. The record has been filed there by the Labor Board. It would be a needless expense to file a duplicate record here. It would be a useless waste of time to try the case piecemeal. The Court of Appeals, for the Tenth Circuit may dispose of the whole matter at one time. To prevent a conflict between two courts of equal dignity in reviewing the same facts it is within our discretion to dismiss the proceeding before us.

CONCLUSION

The petition presents no question of general importance and there is no conflict of decisions; it should, therefore, be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES FAHY,
Assistant Solicitor General,

THOMAS E. HARRIS,
*Special Assistant to the
Attorney General.*

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Assistant General Counsel,

MORTIMER B. WOLF,

JOSEPH B. ROBISON,
*Attorneys,
National Labor Relations Board.*

DECEMBER 1940.



77

—

APPENDIX

A

The order of the Board sought to be reviewed by petitioner in the Court below is as follows:

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Cities Service Oil Company, New York City, the Pure Oil Company, Chicago, Illinois, and The Texas Company, New York City, and their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to grant passes to representatives of the National Maritime Union of America in order that such representatives may go aboard the respondents' vessels to meet with the unlicensed personnel thereon;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Grant passes to the duly authorized representatives of the National Maritime Union of America to go aboard their vessels to meet with the unlicensed personnel; such passes to be issued under such conditions and in such number as shall be determined by collective bargaining between each of the respondents and the Union;

(b) Post immediately in conspicuous places on their vessels for a period of at least sixty (60) consecutive days from the date of posting, notices to their unlicensed personnel stating: (1) that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraph 1 of this order, and (2) that the respondents will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Second Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

B

Paragraph XVI of the motion for leave to intervene presented by Cities Service Oil Company in the court below (R. 18, 29-30) is as follows:

XVI. That your petitioner is not engaged in business in any of the States of Illinois, Wisconsin, and Indiana; but that the fact that only a single hearing was held and a single record made in the three cases above referred to involving respectively your petitioner, The Pure Oil Company and The Texas Company, said cases having been con-

solidated by the Board itself, is substantially conclusive as to the propriety and desirability of reviewing together at one time the three cases which have been so consolidated by the Board itself, especially in view of Paragraph 2 of Rule 36 of this Honorable Court, joinder being not only "practicable," as mentioned in said Rule 36, but for practical purposes essential.